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IN THE SUPREME COURT OF THE STATE OF UTAH

D. C. WATSON and ANNA M. WATSON,
husband and wife; and LEON M. WAT-
SON and BARBARA WATSON, husband
and wife,

Plaintiffs-Respondents,

vs.

Case No.
11321

DONALD M. WHITE and LAVINE H.
WHITE, husband and wife,

Defendants-Appellants.

APPELLANTS' BRIEF

Appeal from Judgment Dismissal complaint and
counterclaim by District Court of Washington County,
Utah, Honorable C. Nelsen, Day, Judge

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FILED

SEP 5 - 1968

Clerk, Supreme Court, Utah

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vs.

DONALD M. WHITE and LAVINE H.
WHITE, husband and wife,

Defendants-Appellants.

Case No.
11321

APPELLANTS BRIEF

STATEMENT OF THE CASE

Suit by sellers under real estate contract for specific performance. Summons served by publication. Counterclaim filed 5 years later but before default entered.

DISPOSITION IN LOWER COURT

On motion by Plaintiff the Court dismissed the complaint without prejudice and the counterclaim with prejudice over Defendant's objection.

RELIEF SOUGHT ON APPEAL

Defendants seek an order reversing the order of dismissal of their counterclaim and of Plaintiffs' complaint.

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diction was acquired by publication of summons as provided in Rule 4(f) (1), URCP, but their failure to do so constitutes an extension by Plaintiffs of the time within which Defendants could plead. *Sanders v. Milford Auto Co.*, 62 U. 110, 218 P. 126. The complaint having been filed and summons issued the action was commenced and was still pending at the time that Defendants filed their answer and counterclaim. *Askwith v. Ellis*, 85 U. 103, 38 P. 2d 757.

Rule 41(b) provides for involuntary dismissal, upon motion of the defendant. The Defendants oppose dismissal and accordingly the Court was not authorized by that rule to dismiss this action on motion of Plaintiffs. Rule 41(c) makes involuntary dismissal under Rule 41(b) applicable to counterclaims, however no grounds specified in Rule 41(b) are asserted by Plaintiffs in support of their motion to dismiss the counterclaim (and no such grounds in fact exist) and the Court was not justified in dismissing Defendants' counterclaim.

Rule 41(a) (2), URCP, specifies the only circumstances under which Plaintiff could obtain a dismissal of their action after an answer and counterclaim had been filed as in our case. That rule reads as follows:

41(a) (2) "By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, *an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can*

STATEMENT OF FACTS

Defendants purchased the Arrowhead Hotel in St. George, Utah, Aug. 25, 1961, on a real estate contract (R. 4-7). During May, 1962, Plaintiffs brought this suit for specific performance of the contract and judgment for unpaid interest installments, $\frac{1}{3}$ of 1961 property taxes, attorney fees and costs, alleging that Defendants were then in possession of the premises (R. 1-10) and in October, 1962, caused a receiver to be appointed to operate the hotel alleging that the property had been abandoned by Defendants (R. 11-13), and summons to be served by publication (R. 14-15). The receiver was discharged in February, 1964. No further action was taken in this matter by Plaintiffs until February, 1968, when Plaintiffs filed their motion to dismiss (R. 37-41) after Defendants had filed an answer and counterclaim alleging unlawful detainer and conversion of personal property. Over Defendants objections the court dismissed both Plaintiffs' complaint and Defendants' counterclaim.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DISMISSING THIS ACTION

Prior to the time Defendants filed their answer and counterclaim Plaintiffs would have been entitled to dismiss this action by filing a notice of dismissal as provided in Rule 41(a)(1)(i), URCP, but was without right to dismiss suit thereafter. *Rogers v. West*, 82 U. 525, 25 P. 2d 971. Prior to that time Plaintiffs could have taken judgment against the Defendants to the extent that juris-

may fairly be drawn therefrom in the light most favorable to the Defendants. *Martin v. Stevens*, 121 U. 484, 243 P.2d 747. Defendants' counterclaim states a claim for relief upon which relief can be granted, if the allegations contained therein can be supported by evidence at a trial, and Defendants are entitled to their day in Court to present evidence in support of those allegations. Defendants' right to have their cause tried by the Court by Article I, Sec. 11 of the Constitution of Utah which reads in part as follows:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; . . . "

The order dismissing Plaintiffs' complaint over the objections of Defendants under the circumstances constitutes an abuse of discretion by the Court.

POINT II

PLAINTIFFS' MOTION TO DISMISS IS NOT AUTHORIZED BY THE RULES OF CIVIL PROCEDURE AND THE COURT HAD NO JURISDICTION TO HEAR THAT MOTION OR TO DISMISS THIS ACTION

Plaintiffs' affidavits and motion (R. 47-42) are based on alleged estoppel, which is an affirmative defense that must be pleaded in a responsive pleading, not by motion.

Rule 12(b), URCP, lists the only defenses that may be asserted by motion. Estoppel is not one of the defenses available by motion and must be asserted as an affirma-

remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."
(Emphasis Added)

The above quoted rule limits the power of the Court to dismiss case at the request of the Plaintiffs and over the objections of Defendants to situations where Defendants' counterclaim remains pending for independent adjudication by the Court. The Court was not authorized by Rule (41) (a) (2) to dismiss Defendants' counterclaim even if the court determined that a proper case existed for dismissal of Plaintiffs' complaint. Baron & Holtzoff, Federal Practice and Procedure, Vol. 2B, P. 120 and cases there cited. Since the Utah Rules were fashioned after the Federal Rules it is proper to examine decisions under the Federal Rules to determine the meanings thereof. *Winegar v. Slim Olsen, Inc.*, 122 U. 487, 252 P.2d 205, 207.

Plaintiffs' complaint requests that Defendants specifically perform the contract between the parties. Defendants, by their answer and counterclaim, seek to enforce their rights under that same contract and to complete their purchase of the Arrowhead hotel. No act or thing done by Plaintiffs has affected or terminated the rights of Defendants as buyers under said real estate contract. Defendants are entitled to litigate their rights under that contract. The fact that the Plaintiffs may have had a change of mind concerning the property is no justification for dismissal of Defendants' counterclaim. At most the grounds asserted by Plaintiffs would constitute a possible defense to the counterclaim. Defendants are entitled to have the Supreme Court review all of the evidence, together with every logical inference which

be asserted by a responsive pleading. Accordingly the Court had no jurisdiction to hear said motion or to dismiss this action pursuant to that motion. Defendants are entitled to their day in court to present evidence which Defendants believe will clearly establish that Plaintiffs could easily have contacted Defendants or their daughter, who had actually managed said hotel during a substantial part of the period during which this action was pending, and that no proper case for an estoppel in fact exists.

The order dismissing this action should be vacated and set aside and the case remanded to the Court for trial on the merits.

Respectfully submitted,

Ronald C. Barker

Attorney for Defendants

tive defense in a responsive pleading to Defendants' counterclaim as specified in Rule 12(b), URCP. Since the Plaintiffs' motion is not permitted under the Rules the Court cannot act thereon and the Court's dismissal of this action was and is beyond the jurisdiction and power of the Court.

Defendants should be permitted to have their day in court and to present evidence and witnesses to establish that no estoppel is in fact available to Plaintiffs in this case; that during a substantial portion of the time said lawsuit has been pending the Plaintiffs in fact knew the address of and conversed with Defendants' daughter, who was the person who actually operated said hotel, and transacted business with Plaintiffs for and on behalf of the Defendants.

SUMMARY

Rule 41(a)(2), URCP, permits a plaintiff to dismiss his complaint after an answer and counterclaim have been filed only by order of the court and only if the counterclaim can remain pending for independent adjudication by the court. Dismissal of Defendants' counterclaim is in direct violation of that rule and should be reversed. Dismissal of Plaintiffs' complaint for specific performance of the real estate contract was and is an abuse of discretion by the court since the Defendants seek by their answer and counterclaim to perform that contract and to complete the purchase of the hotel.

Rule 12(b), URCP, lists the only grounds upon which a defense may be asserted by motion. Estoppel is not one of the defenses that may be asserted by motion, but must